

b. On 5 April 2007, charges of Murder in violation of the law of war, Attempted Murder in violation of the law of war, Conspiracy, Providing Material Support for Terrorism and Spying were sworn against the accused. The charges were referred for trial by military commission on 24 April 2007.

c. On 4 June 2007, an RMC 803 session was held where the Government presented argument regarding jurisdiction over the accused. The Military Judge dismissed all charges and specifications without prejudice.

d. On 6 June 2007, Mr. LeRoy Foreman sent the Chief Defense Counsel and the Chief Prosecutor of the Office of Military Commissions an e-mail circulating the draft Rules of Practice for the Court of Military Commission Review ("CMCR Rules").

e. On 8 June 2007, the Government filed a Motion for Reconsideration of the 4 June 2007 dismissal by the Military Judge.

f. Later on 8 June 2007, the Military Judge caused an e-mail to be forwarded to all parties which clarified his understanding of a footnote in the Government's Motion for Reconsideration.

g. On 28 June 2007, Judge Rolph, the Deputy Chief Judge of the Court of Military Commission Review ("CMCR"), issued the CMCR Rules to all parties.

h. On 29 June 2007, the Military Judge issued P001, entitled Disposition of Prosecution Motion for Reconsideration, denying the Government's request for reconsideration.

i. On 3 July 2007, the Government filed a Certificate of Notice of Appeal with the Military Judge.

j. On 4 July 2007, the Government filed an appellate brief with the CMCR.

k. On 19 July 2007, Appellee filed its Motion to Abate Proceedings with the CMCR.

l. On 25 July 2007, Appellant filed a Motion in Response to Appellee's Motion to Abate Proceedings.

m. On 26 July 2007, Appellee filed a Motion For Leave to Reply to Prosecution's Response to Appellee's Motion to Abate Proceedings and Appellee's Reply.

n. On 7 August 2007, the Appellee filed a "Motion to Dismiss Prosecution's Appeal or, in the Alternative, to Dismiss a Portion of the Prosecution's Notice of Appeal and to Summarily Affirm".

o. On 8 August 2007, Judge Francis directed the Appellant to show cause as to why the Appellee's Motion to Dismiss should not be granted.

Burden and Standard

The burden on this motion is with the Appellant. The claims arising under this appeal are subject to *de novo* review.

Discussion

I

The Government's appeal of the Military Judge's 4 June 2007 order and 29 June 2007 decision on the Government's motion to reconsider was timely filed.

Appellee argues that the Government did not file its notice of appeal, or its appellate brief in a timely manner, and the appeal should either be dismissed, or limited to the procedural issue of whether the trial court erred in its 29 June 2007 decision on Appellant's motion for reconsideration. Appellee fails to address the fact that the Government's motion for reconsideration of 8 June 2007 *ipso facto* extended the deadline for filing the notice of appeal and the appellate brief until after the trial court issued its ruling on the motion. Longstanding

U.S. Supreme Court precedent establishes statutory appeals periods do not begin to run until the trial court rules on a timely-filed motion for reconsideration. The Government's notice of appeal of 3 July 2007 and the appellate brief of 4 July 2007 were filed within five (5) days of the trial court's decision on the motion for reconsideration. The appeal is therefore timely and the Court should dismiss the instant motion.

The relevant statutory and regulatory provisions governing motions and appeals in the Military Commissions process confirm this interpretation. The Military Commissions Act ("MCA") provides that "in a trial by military commission under this chapter, the United States may take an interlocutory appeal to the Court of Military Commission Review of any order or ruling of the military judge that terminated proceedings of the military commission with respect to a charge or specification." 10 U.S.C. § 950d(a)(1)(A). The Rules for Military Commission ("RMC") provide that the Government, if it decides to appeal an order or ruling of the trial court, shall notify the trial judge within five days of the ruling or order. RMC 908(b)(2), (7). Appellee correctly cites the Regulation for Trial by Military Commissions ("Regulation"), which also requires that appeals be filed within five days of the ruling. Regulation ¶ 25-5f.

Appellee argues that these provisions clearly establish a five (5) day filing deadline for appeals to the Court of Military Commission Review, but Appellee wholly fails to cite any relevant law that addresses the impact of a timely filed motion to reconsider on the filing timeline for appeals. RMC 905(f) governs motions for reconsideration before a Military Commission. RMC 905(f) provides:

On request of any party or *sua sponte*, the military judge may, prior to authentication of the record of trial, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge.

The Appellant filed a motion for reconsideration on 8 June 2007, in accordance with RMC 905(f). In its motion, Appellant stated that “an appeal by the government would be premature if noticed prior to a decision on this motion for reconsideration.” Prosecution Motion for Reconsideration, *United States v. Khadr*, at 1 n.1 (8 June 2007). No matter the trial court’s reaction to this assertion, the proposition is well-founded in law and practice. *Cf.* App. Ex. 18 (where the trial judge stated in an e-mail that he “is certainly not aware of any authority on his part to toll the time frame established by statute.”). The period for appeal in this case did not begin until the trial court issued its decision on the motion to reconsider on 29 June 2007.

The sequential nature of the trial and appellate process is succinctly illustrated in Chief Judge Sullivan’s concurring opinion in *United States v. Boudreaux*, 51 M.J. 291 (1992). Judge Sullivan analogizes a case under the Uniform Code of Military Justice to a train moving through a “tunnel of power.” *Id.* at 296-97. *See also United States v. Dawson*, 51 M.J. 411 (1999). At each section of the tunnel, only one authority has jurisdiction until the case/train moves to the next section of the tunnel in which the next authority takes control. In the present case, the CMCR could not have entertained an appeal until after the military judge had completed his “section of the tunnel” by ruling on the motion for reconsideration.

The most closely-analogous federal precedent has developed a bright-line rule on this issue that should be followed by this Court. In *United States v. Ibarra*, 502 U.S. 1 (1991) (*per curiam*), the Government appealed a dismissal by the Circuit Court, which held that the Government’s 30-day filing deadline for an appeal begins to run when the original order is issued, rather than on the date the District Court denied the motion for reconsideration. *Id.* at 2. In its ruling, the *Ibarra* Court reaffirmed the notion “that a motion for rehearing in a criminal case, like a motion for rehearing in a civil case, renders an otherwise final decision of a district

court not final until it decides the petition for rehearing.” *Id.* (citing *United States v. Healy*, 376 U.S. 75 (1964)). See also *United States v. Dieter*, 429 U.S. 6 (1976) (per curiam). The *Ibarra* Court stressed that “[w]ithout a clear general rule *litigants would be required to guess at their peril the date on which the time to appeal commences to run.*” 502 U.S. at 6 (emphasis added).

In the present case, Appellant’s notice of appeal on 3 July 2007 and the appellate brief on 4 July 2007 were filed within five (5) days of the trial court’s decision on the motion to reconsider, dated 29 June 2007. This clearly satisfies the rule established in *Healy* and *Dieter*, and reaffirmed in *Ibarra*: the filing of a motion to reconsider extends the filing deadline for the appeal. See *Healy*; *Dieter*; *Ibarra*. Had Appellant filed its appeal on 9 June 2007, as the Appellee suggests, the appeal would not have been ripe since the motion for reconsideration was still pending before the trial court. See 51 M.J. at 296-97.

Appellee argues that where government appeals are authorized, the rules must be construed against the prosecution. See, e.g., *Will v. United States*, 389 U.S. 90, 96 (1967); *United States v. Santiago*, 56 M.J. 610, 612-13 (N-M. Ct. Crim. App. 2001); *United States v. Pearson*, 33 M.J. 777, 779 (N.M.C.M.R. 1991). These cases are not applicable here. In *Santiago*, for example, the court *agreed* to entertain the Government’s motion for reconsideration, notwithstanding the fact that it was filed almost *two months* after the trial court’s original ruling. See 56 M.J. at 613. Moreover, “policy against piecemeal appeals” in criminal cases, see *Will*, 389 U.S. at 97, depended on constitutional principles that are inapplicable in the trial of an alien held outside the United States.¹

¹ In the Rules for Military Commissions, the Secretary of Defense provided some of those protections as a matter of policy. See, e.g., RMC 707 (protecting the accused’s right to a speedy trial). But the Secretary made a deliberate decision to exempt from the speedy trial protection provided in those rules the time running during the pendency of a Government appeal. . See RMC 707(b)(4)(B). Because the rules expressly address the interaction of speedy trials and government appeals, there is no basis, in policy or otherwise, for this Court to turn to the presumption discussed in *Will*.

Importantly, these courts have recognized that the presumption does not apply when Congress has established a procedure for appeals by the Government. As the court in *Pearson* explained, statutes authorizing Government appeals “are not so strictly construed . . . as to defeat the intent of the legislature in authorizing the procedure.” 33 M.J. at 779. Here, Congress’s intent could not be clearer: In the Military Commissions Act of 2006, Congress *avored* the Government’s ability to appeal rulings, such as the one at issue here, that “terminate[] proceedings of a military commission with respect to a charge or specification.” 10 U.S.C. § 950d. And this policy determination made sense, as Congress understood that complex legal issues in a new trial system would arise and that they should be ventilated by the trial and the appellate court at the earliest practicable opportunity. The Defense’s argument would turn Congress’s policy decision on its head, by barring the careful review of these seminal legal issues because this Court’s rules and procedures were being established for the first time.²

Appellee points out that appeals by the Government are disfavored as a matter of policy. This argument actually supports the Government waiting for decisions on motions for reconsideration prior to filing an appeal to a higher court. Trial courts should first have the opportunity to review their decisions and correct any errors before the Government is compelled to undertake the disfavored avenue of an appeal. *Ibarra* underscores this position. There the Court specifically noted that “district courts are given the opportunity to correct their own alleged errors, and allowing them to do so prevents unnecessary burdens being placed on the courts of appeals.” *Ibarra*, 502 U.S. at 6, citing *Dieter*, 429 U.S. at 8. Furthermore, the *Ibarra*

² Appellee stresses that Appellant was “on actual notice” of the filing deadline due to an e-mail sent by the trial judge, and that Appellant still “let the deadline lapse.” See Appellee Motion to Dismiss at 20. See also Appellate Ex. 18. Appellant did no such thing, and in fact was acting “out of an abundance of caution” and professional courtesy by notifying the trial judge that Appellant did not intend to act on the appeal, if at all, until after the judge ruled on the pending motion for reconsideration. See Prosecution Motion for Reconsideration, *United States v. Khadr*, at 1 n.1 (8 June 2007).

court stressed that prior to filing an appeal, the trial court must decide motions to reconsider irrespective of whether the motions address legal or factual issues, and with no regard to the merit of the underlying motion. *Ibarra*, 502 U.S. at 5-6.

II

The legal issues addressed in the 4 June 2007 Order were examined in greater detail in the 29 June Disposition and are subject to review on appeal.

The trial court's Disposition of Prosecution's Motion for Reconsideration of 29 June 2007 ("Disposition") is a reconsideration of the issues presented in the 4 June 2007 Order. Appellee argues that the trial judge did not reconsider the underlying decision of 4 June 2007. A careful reading of the Disposition reveals that the trial judge not only reconsidered the issues in the underlying decision, but that a ruling was made on them as well.

The Government did file a timely notice of appeal that extends both to the 4 June 2007 Order and the 29 June 2007 Disposition. Nevertheless, whether only the latter order is properly appealed here is of no consequence in this case. As the Government explained at length in its brief on the merits, the trial court made fundamental errors of law. And whether the applicable standard is abuse of discretion or *de novo*, "a mistake of law" is never "beyond appellate correction." *See Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

In Appellants motion for reconsideration and in the underlying appeal, the trial court's 4 June 2007 Order is challenged for "manifest errors of law." *Harsco Corp v. Zlotnicki*, 779 F.2d 906, 909 (3d. Cir. 1985) (internal citation omitted). Appellee incorrectly states that "the military judge's decision declining to reconsider had nothing to do with whether the underlying decision was correct or incorrect." Appellee's Motion to Dismiss at 21 (7 August 2007). The very

reading by the trial judge of Appellant's Motion to Reconsider is an act of reconsideration. But the military judge went a step further and addressed each issue before the court and expanded the rationale of the 4 June 2007 Order. App. Ex. 23 at 5-8. By addressing the merits of the motion to reconsider in his disposition, the military judge effectively made reviewable on appeal these legal issues.

III

Local rules of practice for courts do not establish law, and have no bearing on the timeliness or validity of an appeal.

The standard for filing an appeal at the CMCR is found in RMC 908(b)(11), which provides, "If the United States elects to file an appeal, it shall be filed directly with the Court of Military Commission Review."³ All parties had notice of the rules of the CMCR at an early stage. First, as Appellee acknowledges, Mr. LeRoy Foreman, now the Clerk of the CMCR, forwarded a draft of the Rules of Court on 6 June 2007. Appellee cannot argue that it was harmed by not having knowledge of the Court's rules. If there was any ambiguity as to which rules to follow, the draft rules sent by Mr. Foreman served as the *de facto* rules of the CMCR. Second, on 28 June 2007, Deputy Chief Judge Rolph issued the CMCR Rules thereby giving all parties confirmation of the CMCR's procedures. There was no harm to Appellee at any stage in this process. Furthermore, it has no effect on the timeliness of Appellant's filings. All were done in accordance with the MCA, the RMC, the Regulations, and the CMCR Rules. See Discussion section I above.

Appellee elevates the CMCR Rules to an unwarranted level, as though the Rules themselves could somehow defeat the substantive rights of litigants. They are not law. Rather, the Military Commissions Act of 2006 provides all the legal authority necessary to authorize an

³ Appellee incorrectly cites RMC 908(c)(11), a provision that does not exist. The proper rule is RMC 908(b)(11).

appeal by the Government. This legal authority is supplemented by the RMC, and the Regulations. Specifically, RMC 908 sets the filing deadlines for appeals, and assists litigants by deferring to the rules of practice of the CMCR for filing instructions. RMC 908(b)(11). While tradition encourages litigants to adhere closely to court-issued rules of practice, where there is a conflict between the rules and superior sources of positive law, the law controls. Again, the CMCR Rules serve as a tool for the Court to conduct business in an orderly manner. They also prevent the litigation process from becoming a guessing game as to process and form of filings. Even if the CMCR Rules did not come about exactly as Appellee desires, they have no effect on Appellant's timely appeal. Therefore, the Court should deny Appellee's dramatic request that the appeal should be dismissed because of an alleged defect in the CMCR Rules.

By analogy, federal courts are permitted to make and amend their own local rules of practice. *See Baylson v. Disciplinary Bd. Of Supreme Court*, 764 F. Supp. 328, 333 (1991), *aff'd*, 975 F.2d 102(1992), citing 28 U.S.C. § 2071, Fed. R. Civ. P. 83, and Fed. R. Crim. P. 57. The *Baylson* court explains the primacy of federal rules over local rules of court, and the process under which the local rules are monitored for compliance. *Baylson*, 764 F. Supp. at 334-35. The Court adds, "Local rules that are in conflict with the Federal Rules or Acts of Congress are nullities. *Id.* at 336, citing 28 U.S.C. § 2071; Fed. R. Crim. P. 57; *Frazier*, 482 U.S. at 646; *Lasky v. Continental Products Corp.*, 804 F.2d 250, 255 (3d Cir. 1986); *United States v. Statchuk*, 682 F.2d 466, 467 (4th Cir. 1982). Similarly, if there were arguendo an irregularity in the CMCR Rules, they would have no impact on the appellate filing deadlines set out in RMC 908 and Regulation 25-5f. Certainly, Appellee does not contend that the federal courts would stop functioning because a district or circuit court had defective local rules of court. The same applies to the CMCR, therefore, Appellees argument must be denied.

IV

Appellant filed its appeal in accordance with the CMCR Rules that were properly promulgated, reviewed, and approved.

Appellee argues that Appellant did not file its appeal in accordance with the CMCR Rules for several reasons. First, they argue that the rules were not promulgated by a person authorized to draft the rules of court. Second, they argue that the rules were not properly reviewed and approved. To the extent that Appellee raises issues not addressed in Appellee's Motion to Abate Proceedings of 19 July 2007, the Prosecution's Response of 25 July 2007, and the Appellee's Reply of 26 July 2007, each of which is hereby incorporated by reference, they have been overcome by recent events.

On 9 August 2007, the Deputy Secretary of Defense approved an Action Memo regarding the CMCR Rules. *See* Attachment 1 ("Approval Memo"). This Approval Memo states in relevant part:

Acting pursuant to his authority to prescribe the CMCR's procedures and in consultation with the other CMCR appellate military judges, Deputy Chief Judge John W. Rolph issued guidelines, known as the Court of Military Commission Review Rules of Practice (TAB A), effective on June 27 2007.

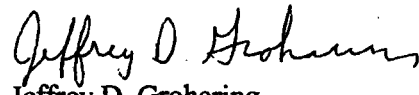
The Approval Memo overcomes Appellee's arguments in two ways. First, it removes any doubt that the CMCR Rules were properly promulgated by the Deputy Chief Judge, Captain John W. Rolph in consultation with the CMCR judges. Second, the Approval Memo removes Appellee's argument that there is no evidence the CMCR Rules were reviewed and approved. The Deputy Secretary of Defense's initials on the "Approve" line makes this abundantly clear.

Even though Appellant does not feel, as Appellee seems to argue, that the CMCR process should come to a grinding halt for allegedly defective rule-making, the Approval Memo

overcomes any of the concerns raised in Appellee's Motion to Abate of 19 July 2007, brought up again in Appellee's Reply of 26 July 2007, and argued yet again in the underlying motion to dismiss. Therefore, Appellant's appeal was properly filed, and Appellee's motion should be dismissed in its entirety.

Relief Requested

For the foregoing reasons, this Court should deny in full Appellee's Motion to Dismiss of 7 August 2007.



Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

//s//

Keith A. Petty
Captain, U.S. Army
Assistant Prosecutor

//s//

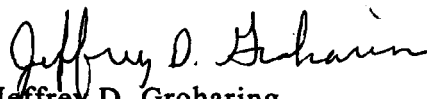
Clayton Trivett, Jr.
Lieutenant, U.S. Navy
Assistant Prosecutor

//s//

Francis Gilligan
Office of Military Commissions
Appellate Prosecutor

CERTIFICATE OF SERVICE

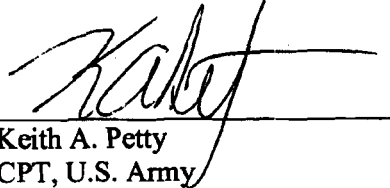
I certify that a copy of the foregoing was emailed to Lieutenant Commander Kuebler on the 13th day of August 2007.


Jeffrey D. Groharing
Prosecutor
Office of Military Commissions



This document is necessary to fully and adequately reply to Appellee's motion to dismiss.

Therefore, this Court should grant Appellant's motion.



Keith A. Petty
CPT, U.S. Army
Prosecutor
Office of Military Commissions
1851 S. Bell St., Suite 532
Arlington, VA 22202



PANEL No. _____
GRANTED (Signature) _____
DENIED (Signature) _____
DATE _____

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed to Lieutenant Commander Kuebler on the 13th day of August 2007.

A handwritten signature in black ink, appearing to read 'KAP', with a long horizontal stroke extending to the right.

Keith A. Petty
CPT, U.S. Army
Prosecutor
Office of Military Commissions

8/3
0811



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

8/6

DEPSECDEF
GE APPROVE
AUG 09 2007
HAS SEEN

AUG 01 2007

DSD Action _____

FOR: SECRETARY OF DEFENSE

FROM: *for* William J. Haynes II *DJ Dell'Antoni, Acting*

SUBJECT: Court of Military Commission Review ("CMCR") Rules of Practice

- Paragraph 25-3 of the Regulation for Trial by Military Commission states, "[t]he Chief Judge of the CMCR, in consultation with other members of the CMCR, shall issue operating guidelines for the CMCR consistent with the M.C.A., the M.M.C., and this Regulation."
- Acting pursuant to his authority to prescribe the CMCR's procedures and in consultation with the other CMCR appellate military judges, Deputy Chief Judge John W. Rolph issued guidelines, known as the Court of Military Commission Review Rules of Practice (TAB A), effective on June 27, 2007.
- It is prudent for the Secretary of Defense to memorialize his review and approval of the Court of Military Commission Review Rules of Practice, which prescribe procedures for appellate review by the CMCR.

RECOMMENDATION: Approve the Court of Military Commission Review Rules of Practice prescribed on June 27, 2007.

Approve *[Signature]* Disapprove _____ Other _____
8-9-07

Attachments:
As stated

SD CA		DSD SA	<i>[Signature]</i>
SD SMA		DSD SMA	<i>[Signature]</i>
SD MA		DSD MA	<i>[Signature]</i>
<i>TSA</i>		DSD MA	<i>[Signature]</i>
STF DIR		DSD MA	<i>[Signature]</i>
ES	<i>M 8/3</i>	ESD	<i>[Signature]</i>
ESR MA	<i>8/3/07</i>		



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TAB A

DEPARTMENT OF DEFENSE

COURT OF MILITARY COMMISSION REVIEW



RULES OF PRACTICE

EFFECTIVE DATE: 27 JUNE 2007

Court of Military Commission Review Rules of Practice

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Court of Military Commission Review Rules of Practice

RULE 1. TITLE; SCOPE OF RULES¹

(a) Title. These rules are to be known as the Court of Military Commission Review Rules of Practice.

(b) Scope of rules. These rules govern practice before the Court of Military Commission Review (CMCR). In case of any conflict between these rules and the Military Commissions Act of 2006 or the Manual for Military Commissions, United States, 2007, the latter two will control.

(c) Suspension of rules.² On its own or a party's motion, the CMCR may – to expedite its decision or for other good cause – suspend any provision of these rules in a particular case and order proceedings as it directs.

RULE 2. JURISDICTION

(a) References. The jurisdiction of the CMCR is based on the following references:

- (1) Military Commissions Act of 2006 (MCA), 10 U.S.C. §§ 948a, *et seq.*
- (2) Manual for Military Commissions, United States, 2007 (Manual), including the Rules for Military Commissions (RMC) promulgated in Part II of the Manual.
- (3) Department of Defense Regulation for Trial by Military Commission (Regulation).

(b) Post-trial review. The record of trial of all military commission cases with a finding of guilty as to any offense shall be referred to the CMCR after the Convening Authority's action in accordance with MCA §§ 950b and 950c and RMC 1111.

¹ CMCR Rule 1 is from Fifth Circuit Federal Rule of Appellate Procedure (FRAP) Rule 1.

² CMCR Rule 1(c) is from Fifth Circuit FRAP 1(c), except Fifth Circuit FRAP 1(c) has an exception for Fifth Circuit FRAP 26(b), which states the court may not extend the time to file a notice of appeal. Because the CMCR is required to review every case that meets certain criteria, this exception is unnecessary. CMCR Rule 1(c) is also very similar to Army Court of Criminal Appeals (ACCA) Rule 25 (Suspension of Rules) and Rhode Island Supreme Court Rule 2.

Court of Military Commission Review Rules of Practice

RULE 3. SCOPE OF POST-TRIAL REVIEW

(a) The CMCR shall decide all cases and matters referred to it under RMC 908, 1111, and 1210.

(b) The CMCR shall consider timely filed written briefs and other pertinent materials submitted by the parties, and in its discretion may permit oral arguments and submissions by *amicus curiae*.

RULE 4. DECISION PANELS AND QUORUM³

(a) The CMCR Chief Judge will establish one or more three-member decision panels, designate the presiding judge for each panel, and establish a procedure for assignment of cases to three-member panels.

(b) Upon motion by a party or one of the judges on the panel to which the case was assigned, the CMCR may, in its discretion, consider a case en banc, if two-thirds of the judges appointed to the CMCR vote to grant the motion for en banc consideration.

(c) The determination of any matter referred to a panel, except a motion for en banc consideration, shall be according to the opinion of two of the three judges on the panel. However, any judge present for duty and assigned to the panel to which the case was assigned may issue all necessary orders concerning any proceedings pending to that panel, and any judge present for duty, or the Clerk of Court, if the Chief Judge has delegated such authority, may act on uncontested motions, provided such action does not finally dispose of an appeal, or case.

(d) For military officers serving on the CMCR as appellate military judges, duty on the CMCR will take precedence over all other military duties.

RULE 5. PLACE FOR FILING PAPERS⁴

(a) When the filing of a notice of appearance, brief, or other paper for consideration of the CMCR is required by these rules, such papers shall be filed at the following mailing address:

³ The rule is from ACCA Rule 4 (Quorum).

⁴ The rule is from ACCA Rule 5 (Place for Filing Papers). The portion pertaining to electronic filing is from Fifth Circuit FRAP 25.2 and Fifth Circuit FRAP 25.3.

Court of Military Commission Review Rules of Practice

Clerk of Court, Court of Military Commission Review
One Liberty Center
875 N. Randolph Street
Suite 8000
Arlington, VA 22203

Should facsimile filing be utilized, such filings may be sent to:

Facsimile: 703-696-1831

Voice telephone number: 703-696-6640

(b) Should electronic filing be utilized, the Clerk of Court will provide and publish an e-mail address. Adobe Acrobat PDF format is the preferred standard. The electronic image of the document constitutes the original document for all CMCR purposes. Filing is complete when the document is received by the Clerk of Court. The provisions in these rules requiring copies are not applicable. The Clerk of Court is authorized to serve all papers, including opinions, electronically.

(c) Any paper not exceeding fifty pages in length in its entirety may be filed by facsimile transmission. The burden is on the sender to ensure receipt, completeness, and legibility. The paper must comply with the typographical requirements of Rule 14(e), (f), and (g), and must show the sender's facsimile and voice telephone numbers. Except as indicated below, if the facsimile shows the signature required by Rule 6 and the certificate of service on opposing counsel required by Rule 14(j), a signed original copy need not be sent unless so ordered by the CMCR.

(d) Copies of papers should also be filed with the opposing parties.

RULE 6. SIGNING OF PAPERS⁵

(a) All formal papers shall be signed and shall show, typewritten or printed, the signer's name, address, military grade (if any), and the capacity in which the paper is signed. Such signature constitutes a certification that the statements made therein are true and correct to the best of the knowledge, information, and belief of the persons signing the paper and that the paper is filed in good faith and not for purposes of unnecessary delay. Each pleading or other paper will be signed by an attorney of record. This applies to original or facsimile filings. Electronic

⁵ This rule is from ACCA Rule 6 (Signing of Papers).

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signatures are authorized. Requirements for admission to the Bar of the CMCR are set forth in Rule 8, and notice of appearance requirements are set forth in Rule 12. A paralegal or legal intern who assists in preparing a pleading or other paper may not sign the paper, but the assistance may be recognized in a footnote.

(b) One attorney of record may sign "FOR" another attorney of record whose signature block appears on the same pleading or other paper if authorized by that attorney to do so, in which event the CMCR will regard the latter as having personally signed the document.

RULE 7. COMPUTATION OF TIME⁶

In computing any period of time prescribed or allowed by these rules, by order of the CMCR, or by any applicable order, instruction, regulation or statute, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, or, when the act to be done is the filing of a paper in the CMCR, a day on which the Office of the Clerk of Court is closed due to weather or other conditions or by order of the Chief Judge of the CMCR, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor a holiday. A facsimile or electronic filing shall be deemed filed when it is transmitted. A document or pleading filed after 5:00 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is in effect at the time of filing, shall be deemed filed on the following day.

RULE 8. QUALIFICATION OF COUNSEL⁷

(a) **All counsel.** Counsel in any case before the CMCR shall be a member in good standing of the bar of the highest court of a state, territory, commonwealth, or possession of the United States, bar of the District of Columbia, or bar of a federal court. No attorney may practice before this CMCR unless admitted to the Bar of the CMCR or appearing by leave of the CMCR *pro hac vice* (Rules 8(c) and 12(e)) or as an *amicus curiae* (Rule 16). Additionally, military counsel must be qualified and detailed in accordance with 10 U.S.C. §§ 949c and 950h as well as Regulation ¶¶ 9-1 and 9-5. The classified information requirements of Chapter 18 of the Regulation apply during the appellate process. *See* Rules 27-29. No counsel may appear in any

⁶ This rule is from ACCA Rule 7 (Computation of Time).

⁷ This rule is from ACCA Rule 8 (Qualification of Counsel). Supreme Court Rules 5 (Admission to the Bar), 6 (Argument Pro Hac Vice), 7 (Disbarment and Disciplinary Action) and 9 (Appearance of Counsel), all pertain to the when and how counsel are permitted before the Supreme Court.

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proceeding before the CMCR while suspended from practice by the Judge Advocate General of any service.

(b) Military counsel. Detailed appellate defense and appellate government counsel shall, in addition to requirements in Rule 8(a), be qualified in accordance with Articles 27(b)(1), Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 827(b)(1); MCA §§ 948k and 950h, as well as Regulation ¶¶ 9-1 and 9-5.

(c) Admission. Upon entering an appearance, counsel shall be deemed admitted *pro hac vice*, subject to filing an application setting forth required qualifications if directed by the CMCR. The applicant must file with the Clerk of Court, CMCR, an application for admission on the form prescribed by the CMCR, together with a certificate from the presiding judge, clerk, or other appropriate officer of a court specified in Rule 8(a), showing that the applicant is a member of the bar in good standing. The certificate must be an original and dated within one year of the actual date of admission to the Bar of the CMCR. Applicants currently certified by a Judge Advocate General pursuant to Article 26(b) or 27(b)(1), UCMJ, 10 U.S.C. § 826(b) or 827(b)(1) may be admitted without a certificate of good standing; however, the CMCR may require evidence of certification. If such evidence of certification is required, the Clerk of Court will so inform the applicant. An application form for admission is at Appendix 2.

Each applicant admitted to practice in the United States shall sign the following oath or affirmation: "I, [full name], do solemnly swear (or affirm) that I will support the Constitution of the United States, and that I will conduct myself uprightly and according to law as an attorney and counselor of the Court of Military Commission Review." The reference to the Constitution of the United States may be omitted by foreign applicants.

If the documents submitted demonstrate that the applicant possesses the necessary qualifications, and if the applicant has signed the oath or affirmation fee, the Clerk of Court will notify the applicant of acceptance as a member of the Bar.⁸

(d) Automatic admission. Admission is automatic without the need for an application or motion for counsel detailed by the Chief Prosecutor or Chief Defense Counsel in accordance with Regulation ¶ 24-4 and Rule 8(a) and (b). The oath taken before the military commission is sufficient. If no oath was taken before the military commission, then the oath must be given in the manner specified in Rule 8(e).⁹

⁸ This rule is based on Supreme Court Rule 5.

⁹ This rule is similar to Supreme Court Rule 9, which does not require admission for counsel appointed under applicable federal statute.

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(e) Admission by Motion. An applicant who so wishes may be admitted on oral motion by a member of the Bar of the CMCR, provided that all other requirements for admission have been satisfied. The motion and oath shall be substantially in the following form:

MOTION

May it please the Court, I move the admission of [full name], a member of the Bar of [qualifying jurisdiction]. I have examined [his/her] credentials on file in the Office of the Clerk of Court and I am satisfied that [he/she] possesses the necessary qualifications for membership in the Bar of this honorable Court.

OATH

I, [full name], do solemnly [swear/affirm] that I will support the Constitution of the United States, and that I will conduct myself as an attorney and counselor of this Court uprightly and according to law. [So help me God.]

The form of the motion may be tailored for admission of more than one attorney. Also, the oath may be administered in interrogatory form ("Do you, [Full Name], solemnly swear . . ." "Do you and each of you solemnly swear . . .").

(f) Foreign attorneys. An attorney qualified to practice in the courts of a foreign state may be permitted to argue *pro hac vice*. Counsel of record for the party on whose behalf leave is requested to argue *pro hac vice* must file a motion seeking permission of the CMCR. Counsel for the appellant *pro hac vice* must be detailed by the Chief Defense Counsel, and must be qualified under Rule 8(a). However, the Chief Defense Counsel may, by motion, ask the CMCR to waive specific requirements in Rule 8(a) for a foreign attorney lacking a security clearance, or being otherwise unqualified. Such waiver will not authorize access to classified information.¹⁰

¹⁰ This rule is from Supreme Court Rule 6.

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RULE 9. CONDUCT OF COUNSEL¹¹

(a) The conduct of counsel appearing before the CMCR shall be in accordance with rules of conduct prescribed pursuant to Rule for Courts-Martial 109 by the Judge Advocate General of the service concerned for military counsel and the rules of conduct of the jurisdictions where they are admitted to practice for civilian counsel. However, the CMCR may exercise its inherent power to regulate counsel appearing before it, including the power to remove counsel from a particular case for misconduct in relation to that case. Conduct deemed by the CMCR to warrant consideration of suspension from practice or other professional discipline shall be reported by the CMCR to the Convening Authority.

(b) Reporting Requirement. Any member of the Bar of this CMCR who is subjected to discipline that results in disbarment, suspension, or other loss of good standing in the bar of any court of the United States or the District of Columbia, or by a court of any State, Territory, Commonwealth, or Possession of the United States, must promptly so notify the Clerk of Court at the address shown in Rule 5. Likewise, any member of the Bar who is suspended from practice in courts-martial or the Court of Criminal Appeals of any military service, or whose certification pursuant to Article 26(b) or 27(b)(1), UCMJ, is withdrawn for cause, shall promptly so notify the Clerk of Court. Counsel also shall promptly notify the Clerk of Court of any issue which may cause substantial doubt about that counsel's qualifications for practice before the CMCR. Foreign lawyers admitted pro hac vice will notify the Clerk of Court if they are subjected to professional discipline by their licensing jurisdiction, or if an issue arises which may cause substantial doubt about their qualifications for practice before the CMCR.

RULE 10. ASSIGNMENT OF DETAILED COUNSEL AND EMPLOYMENT OF CIVILIAN DEFENSE COUNSEL¹²

The Chief Defense Counsel is required to appoint counsel to represent the appellant by MCA §950h(a) and the Regulation ¶¶ 9-1 and 24-4a. An appellant may also be represented before the CMCR by civilian counsel provided by the appellant, or both. Detailed counsel shall, within five days after service of an authenticated copy of the record of trial, forward to the Clerk of Court, Court of Military Commission Review:

¹¹ This rule is from ACCA Rule 9 (Conduct of Counsel).

¹² This rule is from ACCA Rule 10 (Request for Appellate Defense Counsel) and Rule 11 (Assignment of Counsel).

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(a) Notice of the name, address, telephone number, telefax number, and e-mail address of detailed counsel, and

(b) Notice that civilian counsel has been retained or that action has been taken to retain civilian counsel (must include name, address, phone number, telefax number, and e-mail address of civilian counsel), or

(c) Notice that the appellant will be represented by detailed counsel without civilian counsel and the name, address, telephone number, telefax number, and e-mail address of detailed counsel.

RULE 11. RETENTION OF CIVILIAN COUNSEL¹³

(a) When civilian counsel represents an appellant before the CMCR, the CMCR will notify detailed defense counsel, who will notify the civilian counsel when the record of trial is received. If both civilian and detailed military defense counsel represent the appellant, the CMCR will regard the detailed defense counsel as primary counsel unless notified otherwise. Ordinarily, detailed military counsel will provide the copy of the record of trial received during the authentication process to civilian counsel.

(b) Retention of Civilian Counsel. If the appellant at any point in the post-trial process retains civilian counsel, detailed military counsel will ensure immediate notification of the Clerk of Court.

RULE 12. NOTICE OF APPEARANCE AND WITHDRAWAL OF COUNSEL¹⁴

(a) Military and civilian appellate counsel shall file a written notice of appearance with the CMCR. The filing of any pleading relative to a case which contains the signature of counsel constitutes notice of appearance of such counsel..

(b) Notices of Appearance are to be filed with the Clerk of Court. Signing a motion, as distinguished from a pleading, does not constitute notice of appearance. Civilian counsel shall file a written notice of appearance as soon as he or she is retained.

¹³ This rule is from ACCA Rule 12 (Retention of Civilian Counsel).

¹⁴ This rule is from ACCA Rule 13 (Notice of Appearance of Counsel).

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(c) Counsel may withdraw only by leave of the CMCR. A Motion to Withdraw as Counsel should state the reason for withdrawal and, if by an appellant's counsel, must indicate whether the appellant has been informed, whether the appellant consents to withdrawal, and what provisions have been made for continued representation.

(d) In noncapital cases and cases not scheduled for hearing, assigned military counsel need not move to withdraw when the withdrawal is due to counsel's reassignment and the representation will be continued by other assigned military counsel.

(e) If an attorney named on a pleading has not been admitted to the Bar of the CMCR, and automatic admission is not involved, the pleading shall be accompanied by an application for admission to the Bar (Rule 8) or a Motion for Leave of the CMCR to Appear *Pro Hac Vice* (Rule 8(f)) in the case in question. The motion must identify the courts to which the movant is admitted to practice and must indicate whether any disciplinary proceedings are pending against the movant.

RULE 13. WAIVER OR WITHDRAWAL OF APPELLATE REVIEW¹⁵

Withdrawals from appellate review, and waivers of appellate review will be processed in accordance with MCA § 950c and Regulation ¶ 25-7.

RULE 14. ASSIGNMENTS OF ERROR AND BRIEFS¹⁶

(a) **General provisions.** Appellate counsel for the appellant may file assignments of error if any are to be alleged, setting forth separately each error asserted. The assignments of error should be included in a brief for the appellant in the format set forth in Appendix 1. An original of all assignments of error and briefs, and four additional copies shall be submitted. Briefs and assignments of error shall be typed or printed, double-spaced on white paper, and securely fastened at the top. All references to matters contained in the record shall show record page numbers and any exhibit designations. A brief on behalf of the government shall be of like character as that prescribed for the appellant.

¹⁵ This rule is from ACCA Rule 14 (Waiver or Withdrawal of Appellate Review).

¹⁶ This rule is from ACCA Rule 15 (Assignments of Error and Briefs).

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(b) Specified issues. The CMCR may, in its discretion and at any time while an appeal is pending, specify and grant review of any plain errors not assigned by appellant.¹⁷

(c) Time for filing and number of briefs.

(1) Appeals by the United States under RMC 908. Appeals under RCM 908(d) will comply with the time limits and procedural requirements of that rule. In all other appeals under RMC 908, unless the CMCR directs otherwise, the government brief will be filed with the Clerk of Court and served on the accused's military defense counsel within 30 days after the order or ruling being appealed. The defense must file any answer within 30 days of receiving the government brief. Any *amicus curiae* brief must be filed no later than the due date for the defense brief. If the government desires to file a reply brief, a motion for leave to file must be submitted under Rule 14(k) within five days after receiving the defense brief.

(2) Cases referred under RMC 1111. Unless the CMCR directs otherwise, any defense brief shall be filed with the Clerk of Court and served on government counsel within 30 days after the detailed military defense counsel has received the authenticated record of trial. If a defense brief is filed, the government must file any answer within 30 days after receiving the defense brief. If the defense desires to file a reply brief, a motion for leave to file must be submitted in accordance with Rule 14(k) within five days after receiving the government brief. *Amicus curiae* shall submit any brief no later than the due date for the government brief.

(d) Appendix to a brief. The brief of either party may include an appendix. If an unpublished opinion or not readily available reference is cited in the brief, a copy shall be attached in an appendix. The appendix may also include extracts of statutes, rules, or regulations, but a motion must be filed under Rule 20(b), *infra*, to attach any other matter.

(e) Format for briefs. Any pleading or other paper filed with the CMCR must be submitted in original, signed copy, except those filed by facsimile as permitted by Rule 5(c). The original copy must be typed double-spaced in Times New Roman, 12 point, so as to produce a clear black image on a single side of white 8.5-inch by 11-inch, 20-pound paper. Except for electronic and facsimile submissions, all papers shall be pre-punched for a two-and-three-fourths-inch-wide prong fastener at the top center for insertion into a record of trial. Additional copies required by the CMCR may be reproduced by any means producing a clear black image on white paper.

¹⁷ This rule is from Court of Appeals for the Armed Forces Rule 21(d).

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(1) Citations. Citations must conform to the style prescribed by the current edition of *The Bluebook: A Uniform System of Citation* published and distributed by the Harvard Law Review Association, unless otherwise directed by the CMCR. The CMCR, in its discretion, may adopt and publish its own rules of citation.

(2) The Brief on Behalf of Appellant, Brief on Behalf of Appellee, and Reply Brief on Behalf of Appellant must conform to the format and requirements set forth in Appendix 1 to these rules.

(f) Page limitations of briefs. Unless otherwise authorized by order of the CMCR or by motion of a party granted by the CMCR, the page limitations for briefs filed with the CMCR, not including appendices, shall be as follows:

- (1) Briefs of the appellants shall not exceed 30 pages;
- (2) Answers of the appellees shall not exceed 30 pages;
- (3) Replies of the appellants shall not exceed 15 pages.

(g) Type-volume limitations of briefs. A brief of the appellants and an answer of the appellees is acceptable if:

- (1) it contains no more than 14,000 words; or
 - (2) contains no more than 1,300 lines of monospaced text.
- (3) A reply is acceptable if it contains no more than half of the type-volume specified in Rule 14(g)(1) or (g)(2).
- (4) Headings, footnotes, and quotations count toward the word and line limitations. The index, table of cases, statutes, and other authorities, the appendix and any certificates of counsel do not count toward the limitation.

(h) Certificate of Compliance. A brief submitted under Rule 14 must include a certificate stating that the brief complies with the format limitations in Rule 14(f) and the type-volume limitation in Rule 14(g). The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either: (i) the number of words in the brief; or (ii) the number of lines of monospaced type in the brief.

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(i) Form of Certificate of Compliance.

CERTIFICATE OF COMPLIANCE WITH RULE 14(i)

1. This brief complies with the type-volume limitation of Rule 14(i) because:

[principal brief may not exceed 14,000 words or 1,300 lines; reply or amicus brief may not exceed 7,000 words or 650 lines; line count can be used only with monospaced type]

This brief contains _____ *[state the number of]* words,
or

This brief contains _____ *[state the number of]* lines of
text.

2. This brief complies with the typeface and type style
requirements of Rule 14(e) because:

[12-point font must be used with monospaced typeface, such as Times New Roman or Courier New]

This brief has been prepared in a monospaced typeface using
_____ *[state name and version*
of word processing program, e.g., Microsoft Word Version 2000
with _____ *[state number of*
characters per inch and name of type style].

/s/ _____
Attorney for _____
Dated: _____¹⁸

(j) Service on opposing party. Copies of pleadings and other papers filed with the CMCR must be served on the counsel of record for the opposing party, including any civilian counsel. Proof of service shall be by Certificate of Service in the following form:

¹⁸ The length limitations and Certificate are from Court of Appeals for the Armed Forces Rule 24. The length limitations are the same as for Fifth Circuit FRAP 32(a)(7).

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Certificate of Service

I certify that a copy of the foregoing was (mailed) (delivered)
(sent via _____) to _____
_____ at _____
_____ on the ____ day of _____ 20____.

When service is upon civilian counsel, an additional certificate should be added to reflect service on associated military counsel, if any. The Certificate(s) of Service shall be signed by counsel of record or by a person supervised by that counsel.

(k) Supplemental briefs. Any Supplemental Brief on Behalf of Appellant must be submitted by Motion for Leave to File showing good cause for the delayed filing. If the motion is granted, the appellee must file a response within five days. But, when appellee's initial Brief on Behalf of Appellee has not previously been filed, the period for filing that brief is automatically extended to coincide with the time for filing a response to the Supplemental Brief on Behalf of Appellant.

RULE 15. ISSUES PERSONALLY RAISED BY AN APPELLANT

(a) The appellant, without conceding the legality of the findings of guilty or the sentence, may file a pleading that does not assign error, does not raise an error personally asserted by the appellant, and does not request specific relief. In such cases, the Convening Authority will promptly deliver the record to the CMCR unless notified within five calendar days that either side intends to file a brief pursuant to Rule 14.

(b) Unless otherwise briefed or argued by appellate defense counsel, issues personally raised by an appellant shall be brought to the CMCR's attention by footnote or in an Appendix to the Brief on Behalf of Appellant. To support the appellant's contentions, counsel may submit, by motion, written communications from the appellant. The appellant's submissions will not be considered unless they are signed. Appellate defense counsel is responsible for providing a typed transcript in English of any handwritten submissions or in a language other than English. *See* Rule 20(b).

(c) The CMCR may require that any issue personally asserted by the appellant be briefed or argued.

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RULE 16. *AMICUS CURIAE* BRIEFS¹⁹

(a) A brief of an *amicus curiae* may be filed by invitation of the CMCR or by motion for leave to file.

(b) Ordinarily, neither the hearing nor the disposition of a case will be delayed pending action on a motion for leave to file an *amicus curiae* brief or a motion of an *amicus curiae* to participate in a hearing, or in order to await the filing of a brief of an *amicus curiae*.

(c) A brief of an *amicus curiae* is subject to the same length and format limitations as a brief for the appellant or appellee.

RULE 17. ORAL ARGUMENTS²⁰

(a) Oral arguments may be heard in the discretion of the CMCR upon motion by either party or when otherwise ordered by the CMCR. The motion of a party for oral argument shall be made no later than five days after the filing of an answer to an appellant's brief. Such motion shall identify the issue(s) upon which counsel seek argument. The CMCR may, on its own motion, identify the issue(s) upon which it wishes argument.

(b) A Motion for Oral Argument may be filed contemporaneously with the filing of a Brief. The CMCR will issue a Notice of Hearing within five calendar days after receipt of the record and briefs, and at least 10 calendar days before the scheduled date for oral argument. The Notice of Hearing will specify the issues to be addressed during oral argument. Oral argument may be postponed for no more than five calendar days upon a showing of good cause.

(c) The CMCR's hearing calendar is established by Notice of Hearing issued by the cognizant panel in each case. The CMCR does not necessarily consult counsel in setting the calendar, but may take into account a preference expressed by either party. If the CMCR's calendar conflicts with that of another court before

¹⁹ This rule is from ACCA Rule 15.4 (*Amicus Curiae* Briefs) and from Court of Appeals for the Armed Forces Rule 26.

²⁰ This rule is from ACCA Rules 16 (Oral Arguments); 16.1 (Oral Arguments); and 16.2 (Argument by *Amicus Curiae*). The requirement in ACCA Rule 15.4 for multiple photocopies was deleted because the Clerk for the CMCR will provide necessary copies. Under most circumstances, motions and briefs will be scanned and electronically provided to the CMCR members. Supreme Court Rule 28 describes oral argument.

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which counsel is scheduled to appear, counsel shall so notify the CMCR, orally or in writing, within three days after the CMCR's Notice of Hearing is issued. Otherwise, a party desiring re-scheduling shall file a Motion to (Postpone)(Advance) Oral Argument.

(d) Unless the CMCR specifies otherwise, each side will be allotted 30 minutes to present oral argument. Counsel desiring additional time shall show good cause by Motion for Leave to Exceed Time Limit for Oral Argument. Counsel representing the appellant or petitioner (or the moving party when the subject of the hearing is a motion) shall argue first, but may reserve any portion of the time for rebuttal. Surrebuttal ordinarily is not permitted.

(e) Only one counsel may present oral argument for each party. Any party wishing to deviate from this rule must obtain leave of the CMCR by motion. Any counsel who has entered an appearance in the case may be seated at the counsel table. Absent leave of CMCR, only members of the Bar or counsel appearing *pro hac vice* or as *amicus curiae* may be seated.

(f) Military counsel shall appear in the class "A" uniform. Civilian counsel shall wear similarly dignified business attire.

(g) Smoking, eating, and chewing are not permitted in the courtroom. Cellular telephones, pagers, watch alarms, and similar devices, will be turned off. Counsel may provide drinking water for personal convenience, but shall remove it when the hearing is adjourned.

(h) Supplemental citations of authority may be submitted by Motion for Leave to File no later than two days prior to oral argument. Within five days following oral argument, counsel may submit a Motion for Leave to File a Memorandum of Argument or for Leave to File a Supplemental Citation of Authority for any argument or citation made during the hearing that was not set forth in the brief filed prior to argument.

(i) Argument by *amicus curiae*. Argument by counsel of an *amicus curiae* may be allowed on motion filed under Rule 20.

(j) Oral arguments shall be open unless the presiding judge of the decision panel or other competent authority orders the hearing closed in accordance with the criteria and procedures set out for military commissions in RMC 806, Mil.Comm.R.Evid. 505, and Regulation ¶ 18-3.

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RULE 18. DISTRIBUTION OF ORDERS AND DECISIONS²¹

Immediately upon filing of an order or decision of the CMCR, the Clerk of Court shall give notice of the CMCR's orders or decisions by immediately signing, dating and serving them on detailed appellate defense counsel, including civilian counsel, if any, government counsel, the Convening Authority and the DoD General Counsel, or designee.

RULE 19. RECONSIDERATION²²

(a) The CMCR may, in its discretion and on its own motion, or on motion by one of the parties, enter an order announcing its intent to reconsider its decision in any case not later than fifteen days after service of such decision on the detailed appellate defense counsel, and on the government appellate counsel, whichever is later. No briefs or arguments shall be received unless the order so directs.

(b) The CMCR may, in its discretion, reconsider its decision in any case upon motion filed either:

(1) By detailed appellate defense counsel within five days after receipt by counsel of a decision or order, or

(2) By detailed appellate government counsel within five days after the decision or order is received by counsel.

(c) A motion for reconsideration shall briefly and directly state the grounds for reconsideration, including a statement of facts. A reply to the motion for reconsideration will be received by the CMCR only if filed within five days of receipt of a copy of the motion. Oral arguments shall not be heard on a motion for reconsideration unless ordered by the CMCR. The original of the motion filed with the CMCR shall indicate the date of receipt of a copy of the same by opposing counsel.

²¹ This rule is from ACCA Rule 18 (Orders and Decisions of the Court), and Court of Appeals for the Armed Forces Rule 43 (Entry of Judgment).

²² This rule is from ACCA Rules 19 (Reconsideration), 19.1 (Reconsideration), and Court of Appeals for the Armed Forces Rule 43A (Issuance of Mandate). Under ACCA Rule 19, once a higher court has acted on a case, reconsideration can no longer be granted. Reconsideration is useful because sometimes there are mistakes in opinions that can be readily corrected. Assuming a party requests reconsideration 5 days after receipt of the decision, the other party files a rebuttal 5 days later, and the CMCR chooses not to reconsider, the CMCR's decision would be automatically final five days later. The CMCR could also issue an order immediately after receiving the party's request for reconsideration, granting or denying it.

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(d) The time limitations prescribed by this rule shall not be extended under the authority of Rule 21, except that the time for filing briefs by either party may be extended for good cause.

(e) A party may seek reconsideration of a decision by filing a Motion for Reconsideration, and include a copy of the decision or order as to which reconsideration is sought. Any motion for reconsideration must be delivered to the Office of the Clerk of Court, Court of Military Commission Review.

(f) Ordinarily, reconsideration will not be granted without a showing that one of the following grounds exists:

(1) A material legal or factual matter was overlooked or misapplied in the decision;

(2) A change in the law occurred after the case was submitted and was overlooked or misapplied by the CMCR; or

(3) The decision conflicts with a decision of the Supreme Court of the United States, or Article III Federal Court, another decision of the CMCR, a decision of any other court of the United States, or an executive order, directive, or regulation promulgated by the President of the United States or the Secretary of Defense.

(g) The timely filing of a request for reconsideration does not stay the decision of the CMCR.

(h) Unless otherwise announced in an order granting reconsideration, the order granting reconsideration vacates the decision being reconsidered.

(i) Reconsideration en banc of a panel decision is not authorized.

RULE 20. MOTIONS²³

(a) **Content.** All motions, unless made during the course of a hearing, shall concisely state with particularity the relief sought and the grounds therefore. Motions, pleadings, and other papers desired to be filed with the CMCR may be combined in the same document, with the heading indicating, for example

²³ This rule is from ACCA Rule 23 (Motions) and 23.1 (Expedited Ruling on Motions). *See also* Supreme Court Rule 21 (Motions to the Court). Part is from 5th Circuit FRAP 27.

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“MOTION TO FILE (SUPPLEMENTAL ASSIGNMENTS OF ERROR) (CERTIFICATE OF CORRECTION) (SUPPLEMENTAL PLEADING)”, or “ASSIGNMENTS OF ERROR AND MOTION TO FILE ATTACHED REPORT OF SANITY EVALUATION”.

(b) Motions to attach documents. If a party desires to attach a statement of a person to the record for consideration by the CMCR on any matter under Rule 14(d), such statement shall be made either as an affidavit or as an unsworn declaration under penalty of perjury pursuant to 28 U.S.C. § 1746. All documents containing language other than English shall have, attached, a certified English translation.

(c) Opposition. Any opposition to a motion shall be filed within five days after receipt by the opposing party of service of the motion.

(d) Leave to file. Any pleading not required by these rules shall be accompanied by a motion for leave to file such pleading.

(e) Oral argument. Oral argument shall not normally be permitted on motions.

(f) Decisions on motions. In appropriate cases, the CMCR may act immediately on any motion without awaiting an answer from the other party. Any party adversely affected by the CMCR’s action may request reconsideration, vacation, or modification of such action. A single judge of the particular panel to which the case is assigned may act on any motion, but may not dismiss or otherwise determine an appeal. The two judges of the particular panel to which the case is assigned may overrule any motion decided by a single judge.

(g) Service on other parties; “Action Block;” “Comeback” copies.

(1) Each motion must include the certificate of service prescribed by Rule 14(j). Motions that do not seek an order that would remand or otherwise dispose of a case before the CMCR should include the action block shown below. Examples of motions that seek a dispositive order, include a Motion to Withdraw Appeal, Motion to Abate Proceedings Due to Death of Appellant, and Motion for Psychiatric Evaluation.

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(2) The action block, when used, will appear at the left margin on the last page of the motion text:

PANEL No. _____

GRANTED (signature) _____

DENIED (signature) _____

DATE _____

When two or more motions are combined, a separately labeled action block will be included for each ruling sought. In addition to the original, the motion must be filed in sufficient copies to permit return of a signed copy to the moving party, all opposing parties, and any *amicus curiae*.

(h) Readability of accompanying documents. Motions to file or judicially notice documents, except documents on file in the Office of the Clerk of Court, Court of Military Commission Review, must be accompanied by a legible copy of the document, including a certified translation of any foreign language material and a typed copy of any hand-written material in English, if required for legibility.

RULE 21. CONTINUANCES AND INTERLOCUTORY MATTERS²⁴

(a) Except as otherwise provided in Rule 19(d), the MCA, the Manual, or the Regulation, the CMCR, in its discretion, may extend any time limits prescribed and may dispose of any interlocutory or other appropriate matter not specifically covered by these rules, in such manner as may appear to be required for a full, fair, and expeditious consideration of the case. *See* Rule 14(c).

(b) Petitions for extraordinary relief will be summarily denied, unless they pertain to a case in which there is an approved finding of guilty and appellate review has not been waived. The CMCR's authority is limited to interlocutory appeals by the United States under MCA § 950d and RMC 908, cases referred to it pursuant to MCA § 950f and RMC 1111, and petitions for new trial referred to it pursuant to RMC 1210.

(c) The CMCR may, upon motion and for cause shown, grant counsel an extension of time. The filing of a motion for an enlargement does not toll the

²⁴ This rule is from ACCA Rule 20 (Extraordinary Relief), 21 (Government Appeals), and 24 (Continuances and Interlocutory Matters).

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prescribed time period. Counsel must file motions for enlargement of time at least three days prior to the deadline to allow timely consideration by the CMCR.

(d) Motions for extensions require a particularized showing of necessity for the extension, which shall not exceed thirty (30) days. When engagement in other litigation is a cause, specific information is required as to the number and type of cases and the courts involved. If the complexity of issues on appeal is a cause, the number and nature of those issues should be explained. Extreme hardship to counsel, if a cause, must be explained. In each case, the motion must include information on whether the trial was contested, the number of transcript pages, the approved sentence and date of sentencing, and the appellant's current status as to confinement.

RULE 22. INTERLOCUTORY APPEALS BY THE UNITED STATES

(a) Interlocutory appeals by the United States will be processed under the procedures, legal standards, and time limits established in RMC 908 and Regulation ¶ 25-5. Briefs will comply with Rule 14. Briefs will be filed and oral argument, if any, will be scheduled in accordance with Rules 14 and 17, unless more restrictive rules are applicable under RMC 908 or Regulation ¶ 25-5.

(b) Appeals under this Rule will, whenever practicable, take priority over all other proceedings before the CMCR.

(c) Appeals will ordinarily be decided within 30 calendar days after oral argument or filing of briefs, whichever is later, unless the Chief Judge grants an extension of time.

(d) Appeals under this rule may be decided by order in lieu of a full written opinion.

RULE 23. PETITIONS FOR NEW TRIAL

Petitions for new trial referred to the CMCR by the convening authority under RMC 1210 ordinarily will be decided, without additional briefs or oral argument, based on the materials submitted to the Convening Authority.

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RULE 24. RECUSAL OR DISQUALIFICATION OF JUDGES²⁵

(a) **Grounds.** Judges may recuse themselves under any circumstances considered sufficient to require such action. Judges must disqualify themselves under circumstances set forth in 28 U.S.C. § 455, or in accordance with Canon 3C, Code of Conduct for United States Judges as adopted by the Judicial Conference of the United States.

(b) **Procedure.** A motion to disqualify a judge shall be referred to that judge for a final decision. If an initiating judge is recused or disqualified, that judge will notify the Clerk of Court, Court of Military Commission Review, who will arrange for assignment of a substitute judge.

RULE 25. INTERNAL RULES

(a) The Chief Judge, in consultation with the other members of the CMCR, may amend, modify, or supplement these rules.

(b) The Chief Judge may prescribe interim rules and procedures for the CMCR not inconsistent with these Rules of Practice, the MCA, the Manual, or the Regulation.

(c) Suggested changes in these rules should be addressed to the Clerk of Court.

RULE 26. RECORDING, PHOTOGRAPHING, BROADCASTING, OR TELECASTING OF HEARINGS²⁶

The recording, photographing, broadcasting, or televising of any session of the CMCR or other activity relating thereto is prohibited unless specifically authorized by the Court.

²⁵ This rule is from Fifth Circuit FRAP 48.

²⁶ This Rule is similar to ACCA Rule 27 (Recording, Photographing, Broadcasting, or Telecasting of Hearings). If there is significant press interest in oral argument, closed circuit broadcast of oral argument may be appropriate.

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RULE 27. CLERK OF COURT, CMCR²⁷

(a) The Clerk of Court receives documents for filing with the CMCR and has authority to reject any submitted filing that does not comply with these Rules.

(b) The Clerk of Court maintains the CMCR's records and will not permit any of them to be removed from the CMCR except as authorized by the CMCR. Any document filed with the Clerk of Court and made a part of the CMCR's records may not thereafter be withdrawn from the official CMCR files without the permission of the panel where the case is docketed.

(c) The Clerk of Court may accept authenticated portions of records of trial from the Clerk of Court for Commissions prior to authentication of the complete record of trial, and may thereafter transmit such records to the CMCR.

RULE 28. RECORDS OF TRIAL²⁸

(a) **Custody of records.** Original copies of records of trial will not be removed from the Office of the Clerk of Court unless permission is granted by an employee of the Clerk's office and a charge-out record is completed. Classified material will be handled in accordance with these rules, the MCA, the Manual, the Regulation, and applicable security regulations.

(b) **Altering records.** No notes or marks of any kind will be made on the pages of an original record of trial, including the accompanying papers and exhibits, nor shall any page be removed, rearranged, or inserted except in the Office of the Clerk of Court by an employee of that office. Copies of records issued for use of appellate counsel remain subject to recall for further proceedings and for other necessary purposes; accordingly, the making of notes and other marks therein is discouraged, and such notes are not confidential or privileged.

(c) **Number of copies provided to the CMCR.** The Clerk of Court shall provide one copy of the record of trial to each member of the panel to which the case is assigned. The original of the record of trial will be retained by the Clerk of Court.

(d) **Erroneous or incomplete records.** Non-substantive, administrative errors and irregularities found in records of trial, if not made the subject of an order of the CMCR, should be brought to the attention of the Clerk of Court for

²⁷ This Rule is similar to ACCA Rule 29 (Clerk of Court) and Supreme Court Rule 1.

²⁸ This Rule is similar to ACCA Rule 30 (Records of Trial).

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administrative action with a view to correction. The Clerk of Court will not change an exhibit or transcript in the original record of trial, but can file an errata sheet in the allied papers of the record of trial.

RULE 29. CASES INVOLVING CLASSIFIED AND PROTECTED INFORMATION²⁹

(a) **CMCR security officer.** The Clerk of Court shall serve as the CMCR security officer for the purpose of providing for the protection of classified information, and may designate such assistants as are appropriate for such purposes.

(b) **Classified documents.** Documents containing classified information will be stored and safeguarded by the CMCR security officer in accordance with the Executive Order 12958 (EO), 60 Federal Register 19825 (April 20, 1995), Department of Defense Information Security Program Regulation (DoD Regulation 5200.1-R), and the applicable directives of the agency having classifying authority over the documents. Documents classified Secret or Top Secret shall not be removed from the premises of the Offices of the CMCR except under extraordinary circumstances or when directed by competent authority, and removal must be personally authorized by the CMCR security officer or an authorized designee. Should the CMCR security officer or Judges of the CMCR have doubt about the security classification of documents, they may refer them to appropriate officials for classification or declassification review under DoD Regulation 5200.1-R, C3.1.2.1.5.

(c) **Classified and protected information in briefs and filings.** Classified and protected information shall be included in documents filed with the CMCR only when absolutely necessary to full and fair consideration of the issues involved. One complete copy of the classified and/or protected filing shall be filed with the CMCR. The party filing the document shall give written notice to the Clerk of Court and to all other parties prior to the time of such filing that such document contains classified and/or protected information. In addition, there shall be filed a copy of such document from which the classified and/or protected information has

²⁹ This Rule is from Court of Appeals for the Armed Forces Rules 12 (Cases Involving Classified Information) and 35A (Use of Classified Information). If classified information is included in a filing or record of trial, the process is encumbered with additional administrative burdens. Computers and copiers have to be set aside for classified information. Special couriers have to be used to move the classified documents outside the CMCR offices. The classified information is supposed to be stored in a safe. If transported via e-mail, a classified-type system is necessary. DoD Regulation 5200.1-R contains general guidelines about treatment of classified materials. Specific procedures will have to be worked out when classified information is presented to the CMCR.

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been deleted or omitted, in such manner that the pages which contain the deleted or omitted classified information are clearly identified. The party filing the classified document will also ensure the document is properly classified and annotated as required by DoD Regulation 5200.1-R.

(d) The Court of Military Commission Review may adopt additional rules to protect the security interests of the United States or any other nation or interest.

RULE 30. PUBLIC RELEASE OF CMCR FILINGS AND DECISIONS³⁰

(a) The Clerk of Court is authorized to release unclassified filings with the CMCR and CMCR decisions. Filings and decisions will be available at:
<http://www.defenselink.mil/news/commissions.html>.

(b) Responses to media inquiries that cannot be answered by release of documents under Rule 30(a) will be referred to the Assistant Secretary of Defense for Public Affairs in accordance with Regulation ¶ 19-3.

³⁰ This Rule is designed to disclose to the public how filings made to the CMCR and the CMCR's decision will be released or not released to the public. Materials from the Commission hearings are being released by the Clerk of Court for Commissions.

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**APPENDIX 1. FORMAT FOR BRIEF ON BEHALF OF (APPELLANT)
(APPELLEE)³¹**

)	IN THE COURT OF MILITARY COMMISSION REVIEW
)	
UNITED STATES)	BRIEF ON BEHALF OF
)	(APPELLANT) (APPELLEE)
)	
v.)	Case No. 00000000
)	
)	Tried at Guantanamo, Cuba
)	on (dates)
)	before a Military Commission
)	convened by _____
)	
)	
)	Presiding Military Judge
)	Colonel _____

(Full typed name and alias, if any)

**TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY
COMMISSION REVIEW**

Table of Contents

[If the brief exceeds ten pages, a table of contents and a table of cited authorities (i.e., cases alphabetically arranged, constitutional provisions, statutes, treatises, and other materials) with references to the pages in the document where such authorities are cited is required.]³²

Issue(s) Presented

[Set forth, in a concise statement, each issue to presented to the CMCR.
Issues presented will be set forth in upper case letters.]

³¹ This Appendix is from Appendix 1 of the ACCA Rules.

³² The Table of Contents is from Supreme Court Rule 34.2. A Table of Contents is not required under Army Court of Criminal Appeals rules unless the brief exceeds 50 pages.

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Statement of Statutory Jurisdiction

[Set forth the statutory basis of the CMCR's jurisdiction.]

Statement of the Case

[Set forth a concise summary of the chronology of the case, including the general nature of the charges, the pleas of the appellant, the findings and sentence at trial, and any other pertinent information regarding the proceedings.]

Statement of Facts

[Set forth accurately all facts pertinent to the issues raised, including specific page references and exhibit designations. Assertions of fact must be supported by specific citations to the record of trial, exhibits, or, when appropriate, papers accompanying the record of trial (allied or related papers). Any inference a party wishes the CMCR to draw from the facts of record should be clearly identified and the facts supporting that inference set out. If counsel elect not to make a separate statement of facts, but to include them within the particular assignment of error, the pertinent facts should be set forth in one or more paragraphs distinct from the statement of law and argument thereon. Answers may adopt appellant's statement of facts if there is no dispute, or, if there is a dispute, may restate the facts as they appear from appellee's viewpoint. The repetition of uncontroverted matters is not desired.]

Errors and Argument

[Set forth each assignment of error in upper case letters, followed by separate argument for each error unless two or more assignments of error are consolidated for purposes of argument. Arguments must discuss briefly the question presented, citing and quoting such authorities as are deemed pertinent. Each argument must include a statement of the applicable standard of review, and must be followed by a prayer for the specific relief requested.]

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Appendix

[An appendix may set forth matters for the convenience of the CMCR, such as extracts from the record of trial, statutes, rules, or regulations; copies of decisions of other courts; and unpublished decisions. *See* Rules 14(d) and 20. Appendices must not be used to submit extra-record factual matter, which must instead be submitted to the CMCR by Motion to Admit (Defense)(Government) Appellate Exhibit (Letter or Numerical Designation), Motion to Judicially Notice (Description), or other appropriate motion.]

(Signature of counsel)

(Name, grade, branch, and title of military counsel, or name, address, email address of all counsel, and telephone number, including fax number, of civilian counsel, of all counsel should be included)

CERTIFICATE OF COMPLIANCE WITH RULE 14(i)

1. This brief complies with the type-volume limitation of Rule 14(i) because:

[principal brief may not exceed 14,000 words or 1,300 lines; reply brief may not exceed 7,000 words or 650 lines; line count can be used only with monospaced type]

This brief contains _____ *[state the number of]* words,
or

This brief contains _____ *[state the number of]* lines of text.

2. This brief complies with the typeface and type style requirements of Rule 14(e) because:

[12-point font must be used with monospaced typeface, such as Times New Roman or Courier New]

Court of Military Commission Review Rules of Practice

This brief has been prepared in a monospaced typeface using _____ [state name and version of word processing program, e.g., Microsoft Word Version 2000 with _____ [state number of characters per inch and name of type style].

/s/ _____
Attorney for _____
Dated: _____

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was (mailed) (emailed) (delivered) (sent via _____) to _____ on the _____ day of _____ 20____.

(Signature of counsel)

(Name, grade, branch, and title of military counsel, or name, address, email address of all counsel, and telephone number, including fax number, of civilian counsel, of all counsel should be included)

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**APPENDIX 2. FORMAT FOR APPLICATION FOR ADMISSION TO THE
BAR OF THE COURT OF MILITARY COMMISSION REVIEW**

**Clerk of Court, Court of Military Commission Review
(Address TBD)**

The undersigned hereby makes application for admission to the Bar of the Court of Military Commission Review pursuant to Rule 8, Rules of Practice for Court of Military Commission Review.

NAME _____ SSN _____

MILITARY RANK (if applicable) _____

PRESENT OCCUPATION: Name of firm or military unit, address and telephone number:

HOME ADDRESS (permanent) and TELEPHONE NUMBER:

LAW SCHOOL: Name, location, and degree with year granted:

Name all jurisdictions and courts in which you have been admitted to practice law.
Give year admitted to practice:

JURISDICTION:

COURTS (with year admitted)

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If you are currently certified by a Judge Advocate General pursuant to Article 27(b)(2), UCMJ, 10 U.S.C. § 827(b)(2) state the armed force and date:

Have you been disbarred, suspended, reprimanded, censured, or otherwise disciplined as an attorney? Yes or No: _____. If so, state the name and address of the authority in possession of the record thereof:

Are there any charges or complaints now pending concerning your conduct as an attorney? Yes or no: _____. If so, state the address of the authority in possession of the record thereof:

I have read the foregoing document and have answered all questions fully and frankly. The answers are complete and are true of my own knowledge.

DATE _____ SIGNATURE _____

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ADMISSION REQUIREMENTS

a. To be eligible for admission to the Bar of the CMCR, an attorney must be a member in good standing of the Bar of the highest court of a state, territory, commonwealth, or possession of the United States, the District of Columbia, or of the Bar of a Federal Court.

b. Except for persons currently certified by a Judge Advocate General pursuant to Article 26(b) or 27(b)(1), UCMJ, 10 U.S.C. § 826(b) or 827(b)(1), the application must be accompanied by a current original certificate of admission and good standing before the Bar of the highest court of a state, territory, commonwealth, possession, or District of Columbia, or of the Bar of a Federal Court. (A certificate from the highest court of a State or similar jurisdiction is preferred.) The certificate is current if it is dated not more than one year before the date of admission. When admission is sought on the basis of certification under Article 26(b) or 27(b)(1), UCMJ proof may be required at the discretion of the CMCR.

c. Similarly qualified attorneys of foreign nations may be admitted to honorary membership in the Bar.

ADMISSION PROCEDURES: Admission procedures are set out in Rule 8. Applications should be mailed to: **Clerk of Court, Court of Military Commission Review, 875 North Randolph Street, Suite 8000, Arlington, VA 22203.**

FEE: There is no fee for admission to the Bar of the CMCR.

REPORTING PROFESSIONAL DISCIPLINE: Any attorney admitted to practice before the CMCR who is subjected to public discipline by any court of the United States or the District of Columbia, or by a court of any state, territory, commonwealth, or possession of the United States, or is suspended from practice in courts-martial, or in another United States military court, commission or tribunal, or whose certification pursuant to Article 26(b) or 27(b)(1), UCMJ, is withdrawn, shall promptly inform the Clerk of Court of such action. Foreign lawyers will notify the Clerk of Court if they are subjected to public discipline or suspended from practice in their licensing jurisdictions.